UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mainstream Fashions Franchising, Inc.,	)	File No. 19-cv-2953 (SRN/TNL)
Plaintiff,	)	
vs.	)	Saint Paul, Minnesota January 17, 2020 1:30 p.m.
All These Things, LLC, et al,	)	
Defendants.	)	

BEFORE THE HONORABLE SUSAN RICHARD NELSON
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

APPEARANCES

For the Plaintiff:	LATHROP GPM, LLP CRAIG P. MILLER, ESQ. 80 South Eighth Street Suite 500 Minneapolis, Minnesota 55402
For the Defendants:	DADY & GARDNER J. MICHAEL DADY, ESQ. KRISTY LYNN MIAMEN, ESQ. RACHEL D. ZAIGER, ESQ. 80 South Eighth Street Suite 5100 Minneapolis, Minnesota 55402
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P R O C E E D I N G S

IN OPEN COURT

THE COURT: We are here today in the matter of Mainstream Fashions Franchising, Inc. versus All These Things, LLC, et al. This is civil file number 19-2953.

Let's begin by having counsel note your appearances, please.

MR. MILLER: Your Honor, Craig Miller on behalf of the plaintiff, Mainstream Fashions Franchising. I have with me at counsel's table the CEO of Mainstream, Corey DeNicola.

THE COURT: Very good. Good afternoon.

MR. DADY: Good afternoon, Your Honor. My name is Michael Dady. I have with me my partner Kristy Miamen and our colleague Rachel Zaiger. And also appearing with us today are our two clients, Anitra and Brad Mitchell.

THE COURT: Very good. Welcome to everybody.

We are here to consider two motions, plaintiff's motion for preliminary injunction and defendants' motion to dismiss. I always take motions in the order in which they are filed and so we'll begin with the plaintiff's motion for the preliminary injunction. Mr. Miller.

MR. MILLER: Thank you, Your Honor.

May I proceed, Your Honor?

THE COURT: You may.

MR. MILLER: Your Honor, this case is about two former franchisees who operated Mainstream boutique franchise businesses in Mooresville and Winston-Salem, North Carolina for approximately eight years before they decided they wanted to go out on their own and operate two competing women's clothing and accessory businesses without -- to avoid having to pay royalties to Mainstream.

After using Mainstream's trademarks, business system, goodwill, confidential and proprietary materials, and customers for eight years, they made the conscious decision to abandon their franchises and now want to misappropriate the goodwill associated with the Mainstream trademarks, use Mainstream's confidential and proprietary information, and use Mainstream's customers to operate those competing businesses at the exact same location as their former franchise businesses.

But, Your Honor, they simply cannot do that under the terms of the noncompete and non-solicitation provisions in the Franchise Agreement, as well as the other post-term obligations. I'm not going to reiterate for the Court specific to what all those post-term obligations that are specifically set out in the briefing.

THE COURT: And you can assume I've read everything.

MR. MILLER: Understood, Your Honor. I appreciate

that. But I do want -- in the interest of time, I want to try to focus on what I think are the salient points.

If we look at the *Dataphase* factors and we focus on the most important one, which is the likelihood of success on the merits, it's clear, Your Honor, that in this instance we've met our burden of demonstrating that there's a likelihood of success on the merits that the defendants have breached the noncompete, the non-solicitation provisions, as well as the other post-termination obligations in the Franchise Agreement.

We have demonstrated through the briefing and the declaration that we properly terminated the Franchise Agreements because defendants abandoned their franchises and they refused and failed to install the POS system that they were required to install under the terms of the Franchise Agreement. So based upon that, we had the right to terminate the Franchise Agreements and, in fact, did do that.

Following the termination, as you know, Judge, the defendants have an obligation to comply with the noncompete, which in Article 18.2 says for a period of two years they will not divert, or attempt to divert, any business or customers of their business to a competing business.

And secondly, they agreed that for that same two-year period they will not own, operate, lease, be

engaged in, or have any interest in any business that is in any way competitive with or similar to the Mainstream franchises that they owned and operated.

Here, the record reflects and demonstrates, there's no dispute, that they in fact are operating women's clothing and accessory businesses in their former Mooresville location, as well as in the Winston-Salem location.

THE COURT: Talk to me a little bit about the enforceability of that noncompete. Help me with some North Carolina case law that enforces such an expansive noncompete.

MR. MILLER: Your Honor, I don't think that it is expansive. I think that it's enforceable, first of all, because we have some legitimate interests to protect, right? And so we've listed and identified what those legitimate interests are.

THE COURT: That's always true. The question is whether it's overly expansive.

MR. MILLER: I don't think it is, Your Honor. I think that we've cited several cases in our brief where the courts have specifically looked at language that is similar to the language in this situation which talks about similar to and competitive with, and those courts enforced the covenants that had the exact same language. For example,

the *Baskin-Robbins* case, as well as the outdoor living -- excuse me, outdoor living case -- excuse me, *Outdoor Lighting* case that we've cited in our briefs.

In both of those instances the Court found that language that stated that any interest in any business which is the same or similar to the store was and is enforceable. So under the existing case law, we believe that the noncompete is not overbroad. If you look at the cases that they cite in support of this, they are not applicable, Your Honor.

Specifically if you look at the *Pirtek* case, you know, that's a case that deals with Florida noncompete law. It has no precedential value here. The *Window Gang* case that they cite, and that they rely heavily on, is a state trial court opinion. And in that instance the court determined that the language in there was overly broad because it prohibited the franchisees from working in any business which "conducts residential or commercial cleaning services."

That was too broad in that instance, Your Honor, because the franchisee was only seeking to operate a competing window cleaning business, which wasn't directly necessarily directly competitive with the overbroad language that was in that noncompete.

That's not the situation that we have here, Your

Honor. We've got a situation where we are seeking to prevent the defendants from operating a women's clothing and accessories business, the exact same business that they operated when they were franchisees of Mainstream. It might be overbroad if we were seeking to enforce -- stop them or prevent them from operating a clothing store or just an accessory store, but that's not the case in this instance. We're seeking to prevent them from operating the exact same business that they operated when they were Mainstream franchisees.

THE COURT: Well, they say it's not the exact same business and you say, Well, it's women's clothing and accessories; that's enough. And, of course, women's clothing and accessories, like any other business, is targeted at various different populations, and it may be competitive and it may not be. Women's clothing and accessories is a big umbrella, wouldn't you agree?

MR. MILLER: I don't disagree with that, Your Honor, but the evidence that we submitted in support of our motion demonstrates that it's the same layout. They are using -- they are selling the exact same products that they sold when they were Mainstream franchisees. As a matter of fact, the evidence demonstrates that they are selling the Mac and Me brand, which is an exclusive brand to Mainstream.

THE COURT: They deny that, right? They deny

that.

MR. MILLER: No, they don't deny that. What they say is, Well, that was a mistake. We -- you're correct --

THE COURT: One time thing on the shelf. They took it off when they saw it.

MR. MILLER: That's what they say, Your Honor, correct. And, you know, that could be true, it might not be true. But the fact of the matter is that demonstrates that they are selling the exact same type of clothing and accessories that they sold when they were Mainstream franchisees. They don't dispute that. I think what they say is that if you look at the inside of the store, there's a different feel and vibe to it. But they don't dispute that they sell the same type of products and the same type of accessories that they sold when they were Mainstream franchises.

I would also note, Your Honor, that even if the Court believes that -- or is uncomfortable with the language of competitive with or similar to, whatever makes the Court uncomfortable, it's clear under North Carolina law that this Court has the right to blue pencil. So I think, for example, in the *Window Gang* case, a case that they rely heavily on, if the franchisor in that instance had requested that the court blue pencil the similar to language, that case would have had a completely different outcome.

But if you read the case, it states that the only -- that they were focusing on other language. They weren't focusing on the similar to language.

So in this instance, to the extent that the Court feels it might be overbroad, it has the ability to simply strike the similar to language and just use the competitive with language; and that language specifically would prevent the franchise -- the former franchisees from operating their women's clothing and accessories business.

Does the Court have any questions at all about the legitimate business interests that the -- that have been set forth in the -- our moving papers?

THE COURT: No, hum-um.

MR. MILLER: Okay. And I think, Your Honor, just moving to the other -- so we think that we've satisfied the three elements of an enforceable noncompete. Establishing legitimate business interests, demonstrating that it doesn't violate the public interest, and also demonstrating that it's not -- it's not unreasonable as to scope and geographic -- geographic and time location.

But if we look at the other post-term obligations, we've also demonstrated a likelihood of success with respect to those. I mean, it's clear that they have not provided us with the customer list, which is an obligation under the terms of the Franchise Agreement.

They say because we had momentary access to the Constant Contact account that we had access to their customer information. That's only true for -- in a small part and parcel, Your Honor, because that -- that Constant Contact account doesn't include all of the customers that they have. And in any event, even if we had momentary access to it, the reality of this is that they were supposed to physically give us a customer list with all the contact information and they failed to do that.

They also admit that they have not assigned over the telephone numbers, the directory listings, and the e-mail accounts. They say that they are no longer using the telephone numbers and that should be enough, but the fact of the matter is they've got an obligation to assign those. And absent them being involved in the assignment process, we can't get access to that; and so they are basically holding those telephone numbers hostage from us.

Similarly, with respect to the business assets, they have an obligation to identify for us what business assets they have that they used in their former franchise business. They have failed to give that to us. They say that they've satisfied that obligation because they've said, Well, hey, if you want anything, let us know what you want. Well, we don't know what we want unless they tell us what they have. They haven't done that, and presumably they

haven't done that, Your Honor, because they are using those fixtures and equipment and inventory and accessories in their competing business, which again would demonstrate that this women's clothing and accessory business is the same type of business that they operated as former franchisees.

Your Honor, I think we've set forth all of the information necessary for the Court to determine whether or not we've satisfied the *Dataphase* factors. I do, instead of focusing on those other *Dataphase* factors, unless the Court wants me to, I just want to focus on two broad-reaching arguments that the defendant makes in responding to our motion.

THE COURT: Well, you should also focus on irreparable harm.

MR. MILLER: Okay. If we look at the irreparable harm, Your Honor, there's numerous harm that's being sustained as a result of the operation of their competing business. Number one, first and foremost, is the harm to the goodwill. If the injunction is not granted, the goodwill is harmed because defendants are allowed to compete unfairly with Mainstream and divert customers to that competing business which obviously causes incalculable and continuing loss of customers and goodwill, which is an immediate harm to Mainstream.

Denying the injunctive relief would also harm

Mainstream because it's going to make it virtually impossible for Mainstream to re-franchise that territory or put another franchisee in there. A franchisee is going to be reluctant to open up a business there, a Mainstream business, knowing that right across the street or right around the corner is a former Mainstream franchisee who has inside knowledge of Mainstream's business methods and is going to use that to compete against the Mainstream franchisee that's taking over that territory, not to mention that they are taking advantage of the customers who have been built up in that area using the Mainstream marks and trademarks.

Mainstream is also going to suffer irreparable harm if the noncompete is not enforced because if the Mitchells, the defendants in this case, are allowed to avoid their noncompete, I guarantee you there's going to be other franchisees getting in line saying, Hey, why don't we do the same thing. Let's abandon our franchise. Let's open up a competing business so we don't have to pay Mainstream any royalties. If that happens, then the system as we know it is going to unravel and is no longer going to be in business, which again under established case law is irreparable harm.

There's also irreparable harm to the sense that there's customer confusion caused by the former franchisee

operating that same type of business. A customer walks in, they see the Mac and Me brand, which is known only for the Mainstream business, they are going to wonder, Well, is this business the same as the Mainstream business that used to be here? That creates customer confusion.

We've already also seen the customer confusion because customers who have store credits with their old franchise stores are calling Mainstream and calling neighboring franchisees wondering how that customer credit is going to be dealt with. That creates a problem for Mainstream for its name and for the franchisees in its area. It doesn't look good for goodwill.

It also, you know, it harms our relationships with our franchisees because if we're -- if we don't take action on this and enforce the noncompete, then the franchisees in that neighboring area, which in this case would be Kernersville and Charlotte, which are only I think 15 and 30 miles respectively away from the former businesses, they are forced to compete with that franchisee, which impacts their business relationship, which ultimately impacts our relationships with our franchisees.

So all of these harms are irreparable. Under existing case law, each of this harm is a basis or reason for enforcing the noncompetes, and the existing case law also demonstrates that each of the harms that I just

outlined are incalculable and there's no way that they can be satisfied through monetary damages.

I would note that the one case that they kind of cite inapposite to our harm argument is the *In Re: Shelly's* case, but that case didn't involve a franchisee that was actually operating a competing business. That case involved a situation where a franchisee was thinking about going on its own and thinking about operating a franchise -- or excuse me -- a competing business against its former franchise, but never exactly took the step to do that. And so in that instance, that probably led the court to determine that there was no potential harm to the franchisor's goodwill and they could be compensated with monetary damages. But that's not the case we have here, Your Honor.

And I think the harm that I've just outlined outweighs the harm to the defendants. I mean, the case law is clear, Your Honor, and they have stated it time and time again in the context of a motion for preliminary injunction, if the harm to the defendants or the franchisees is self-inflicted, then that harm is outweighed by the harm that's sustained by the franchisor. Here, the defendants made the conscious decision to walk away and abandon their former franchises. They made the decision to go out on their own knowing that there was a noncompete in place and

knowing that there was post-termination obligations to prevent them from what they are trying to do now.

In a situation like that, Your Honor, the courts have made it clear that that's self-inflicted harm and that's not gonna outweigh the harm to the franchisor, in this instance Mainstream.

I also want to talk again about just the two overreaching arguments that the defendants have made. One is that because Mainstream allegedly breached the Franchise Agreement before it was terminated, that somehow invalidates or releases the post-term obligations that they have. That is not the law, Your Honor.

In this instance it's clear under the case law that if we have an independent basis to terminate the franchise relationship, which we did, and we've demonstrated that we had the basis to terminate for failure to install the POS system and their abandonment of the franchise, in that situation when we have the basis to terminate, they've got an obligation to comply with the post-termination obligations.

It makes no difference if before that termination took place there are breaches that are being alleged against Mainstream. Their remedy in that situation is to simply sue, in a counterclaim fashion, Mainstream for monetary damages. They do not have the right to avoid or ignore,

invalidate their post-termination obligations, which is the argument that they are trying to make in this situation.

They rely on -- and I think it's also important to point out that the language of the post-term obligations, as well as the noncompete, specifically states that the post-termination obligations must be complied with no matter how or why the Franchise Agreement is terminated. And so even if they -- even if they are going to contest or argue that we didn't have a basis to terminate, the fact of the matter is they state in their briefs and in the letters that they sent on November 1st that they were terminating the Franchise Agreement.

So regardless of who terminated, the fact of the matter is that they are terminated; and because they are terminated, they have an obligation to comply with their post-termination obligations. They have not cited any case law that suggests that a breach of a Franchise Agreement or breach of the implied covenant of good faith and fair dealing allows them or releases them from their obligations under the post-termination obligations in a situation like this where the Franchise Agreement was actually terminated.

The other and final point that I wanted to focus on is their MFA argument, Your Honor. I have been doing this for 23 years and I don't think I have ever seen an argument where more of a stretch was made. They are trying

to suggest that the MFA applies here and that that somehow would bar enforcement of the noncompete.

Your Honor, the MFA doesn't apply for several reasons. First of all, the addenda that they refer to, which was simply a form addenda that was included in the FDD, was never incorporated or intended to be an incorporated into the Franchise Agreement. It's merely a form document, just like the other form documents from the other 12 or 13 registration states that have form addendas tied to the FDD. That simply because they are including it in the FDD doesn't mean that they're automatically incorporated into the Franchise Agreement. That addenda would only be incorporated to it if it was initialed by the parties and physically incorporated into the Franchise Agreement, which it wasn't.

It wasn't because, as we state in the declaration from Mr. DeNicola, the parties never intended for it to be included. And tellingly, there's no statement from the defendants themselves stating that that was intended to be included in there. And it wasn't intended to be included in there, Your Honor, because there's a waiver provision in the Franchise Agreements that specifically say that the parties waive application of the MFA.

THE COURT: But isn't it true that if there were not a waiver provision, or the waiver provision was not

knowingly and voluntarily made, that the Minnesota Franchise Act benefits would accrue to these folks? In other words, it doesn't need to be incorporated in the Franchise Agreement. The law says that it applies to Minnesota franchisors unless there is a knowing and voluntary waiver. Some law suggests that there can't be a knowing and voluntary waiver. That's another issue.

But you're suggesting that a Minnesota franchisor can actually issue a franchise from Minnesota where the Minnesota Franchise Act doesn't apply?

MR. MILLER: Correct, Your Honor.

THE COURT: And tell me how you -- why you --

MR. MILLER: For two reasons. One, the waiver argument, right?

THE COURT: Take the waiver off the table. The question is whether it has to be incorporated into the document itself. I don't believe it does. It's the application of the law to the Franchise Agreement.

MR. MILLER: Well, I know you want me to ignore the waiver provision so I will.

THE COURT: Yes.

MR. MILLER: But that's out there. The other issue is under existing case law, it's clear that the MFA does not apply to franchisees that are located outside the State of Minnesota. If the franchisee operates his business

and is located in another state, like in this instance North Carolina --

THE COURT: Even if the franchise is issued in Minnesota by a Minnesota franchisor?

MR. MILLER: Correct.

THE COURT: That's not how I read the law.

MR. MILLER: Well, Your Honor, we've cited the case law in our brief that supports that.

THE COURT: Well, the case law you've cited suggests that the waiver in a couple of cases may be effective for an out-of-state franchise.

MR. MILLER: Correct, that's the *Hockey Enterprises* case, Your Honor. But I also point the Court to the *Johnson Brothers Liquor Company* case, as well as the *Wave Forms Systems* case, both instances where the Court said: "Where a franchisor to a Franchise Agreement is a Minnesota corporation, the agreement is not within the purview of the MFA if the franchisee is not located in and does not operate in Minnesota."

THE COURT: And your position is the Minnesota Franchise Act only applies where you have a Minnesota franchisor and Minnesota franchisee, period. Never applies outside the state boundaries?

MR. MILLER: Correct, Your Honor.

THE COURT: Okay.

MR. MILLER: That's what the case law holds. And I encourage the Court to take a look at those two cases that I just cited.

But, Your Honor, even assuming -- let's assume that the MFA does apply. That doesn't change anything. Because the fact of the matter is under the MFA, a franchisor has the right to immediately terminate a Franchise Agreement if the franchisee abandons that franchise store.

THE COURT: But of course here there's a fact question about whether this was abandonment or not. They take a different position.

MR. MILLER: They do, Your Honor.

THE COURT: Yeah.

MR. MILLER: But I think if the Court is going to weigh the facts of this case -- and I'm not surprised that they are going to take that position -- but if the Court is going to weigh the facts, I think it can clearly determine that there's a substantial likelihood of success that they did properly terminate for abandonment.

If you look at the letters that are in play here, on October 2nd we sent out our notice of default for failure to install the POS system. The next day they send a letter to us and say, Wait a minute, you can't force us to install that. That's unreasonable. And, Oh, by the way, you're in

breach and, you know, we've got the right to terminate the Franchise Agreement.

Then on November 1st they send another letter stating that we are terminating the Franchise Agreement effective immediately, and we're ceasing operations. We're removing our signs. We're sending the manuals back, et cetera, et cetera. I don't know how anybody could look at that set of facts and not determine that they had ceased operating and therefore abandoned their franchise.

So as a result of that, four days later on November 5th, we sent a notice of termination stating, Hey, we're terminating your franchise rights because, one, you failed to install the POS system that you were required to install; and you didn't cure the default within 30 days. And also, based upon your November 1st letter, you have clearly abandoned your franchise so we're terminating those Franchise Agreements.

Under that factual scenario, Your Honor, I would have a hard time understanding how somebody could determine that abandonment hasn't taken place.

The last thing, Your Honor, that I wanted to address, unless the Court has additional questions for me, is just the bond issue. You know, the defendants claim that if we're successful on our motion, that we should be obligated to post a bond in the amount of $350,000 which

they claim is the damages that they would sustain if they were forced to shut down their competing businesses.

I should note that this Court has broad discretion in determining whether or not a bond should be issued and what the bond amount can be. The Court also has discretion to say that we're not going to enforce the bonding requirements at all under Rule 65(c).

In this instance I think no bond is warranted for a couple of reasons:

Number one, there's a bond waiver provision in the Franchise Agreements. Under Article 20.1 the parties agreed that Mainstream is entitled to injunctive relief without the posting of a bond. So that weighs in favor of not requiring the posting of such a bond.

In addition, Mainstream's been around for 30 years. This company is not going anywhere, Your Honor. It's a strong, vibrant company. And so to the extent that there's a concern that there's not going to be any money if it's somehow later determined that the injunction was granted improperly, that's not a concern because it's a solvent and financially strong argument or strong company.

And lastly, Your Honor, I think when determining whether or not bond needs to be posted, the Court can look at the facts of the case and determine, Hey, not only is there strong likelihood of success on the merits for this

preliminary injunction, but looking down the line, the facts as we know them, it's pretty clear that Mainstream's going to be entitled to a permanent injunction. And so in that instance there's not likely to be any damages for the defendants which is going to warrant the posting of a bond.

So with that being said, Your Honor, we ask that the Court enter an order consistent with the proposed order that was submitted on file with this Court.

THE COURT: Thank you, Mr. Miller.

Mr. Dady.

MR. DADY: Thank you, Your Honor. We have a PowerPoint to share. We've got handouts for the counsel and the Court.

We're not going to use all those slides, Judge, but we have them for backup in case you have questions. We just want to zero in on a few.

THE COURT: All right. Thank you.

MR. DADY: But given kind of the last topic addressed, I'd like to address that first and that is the applicability of the Minnesota Franchise Act, and Mr. Miller wants to talk about being around a long time. I have been around about as long as the Minnesota Franchise Act practicing franchise law, Judge, and he's just plain wrong. We don't need to look at an oddball case or two to decide whether this Minnesota Franchise Act applies to out-of-state

franchisees or not because the statute is crystal clear.

Minnesota Statute 80C.19 subdivision (1) says that applicable sales and offers to sell or purchase, is it limited to Minnesota residents? No. The provisions of Section 80C.01 to 80C.22 concerning sales and offers to sell shall apply when a sale or offer to sell is made in the state. It's undisputed that's what happened here. When an offer to purchase is made and accepted in this state, or when the franchisee is to be located in the state. It doesn't have to be, but if it is, it applies.

Similarly, subdivision (2) says the same thing and it clearly applies outside the state for the purposes of Section 80C.01 to 22. An offer to sell or to purchase is made in the state whether or not party is then present in this state, when the offer originates from the state, as it did, or is directed by the offer to this state and received by the offeree in the state. So the statute clearly applies by the plain language of the statute.

There's been some revisionist history going on here in the statement of facts by Mainstream counsel and so the first thing we did, anticipating that, is to prepare a timeline, and that's our first PowerPoint, Judge, and I do want to breeze through that, but to make it clear what the facts are and aren't. And every one of these PowerPoint presentations in the handout has got a cite to the record

that shows the statement.

And for starters, Anitra Mitchell has significant experience in the clothing business before she ever considered and became a Mainstream franchisee.

On June 2 of 2011, the Winston-Salem Franchise Agreement was signed by an entity owned by Anitra Mitchell and her mother Charlotte Parris, and the business was operated out of the basement of Anitra's home. It wasn't until August 1 of 2012, on page 3, that the Winston-Salem bricks and mortar location was opened by the mother-daughter entity.

There was one visit, and one visit only, about two years later by executives from Mainstream. That first and only visit was by Marie DeNicola, Corey DeNicola's mother and the founder of the company, in 2014, her one and only visit, and she never did visit the other location.

October of '14 there was some scurrilous suggestion that there was some transfer made to try and hoodwink Mainstream in some way that's poppycock. The conveyance occurred in September of '14. Charlotte Parris conveyed her 50 percent interest in the entity to her son-in-law for two reasons. She couldn't keep up because of her own illness and she was dealing with the ultimate death of her husband. And secondly, in those circumstances she wanted to make sure the business didn't fail, so she

transferred her interest to her son-in-law.

January 16 of 2015, the Mooresville Franchise Agreement was signed by Brad and Anitra Mitchell. June 1 of 15, the bricks and mortar location was opened there, and the leases at those two locations continue so it's not surprising their clients, in an effort to mitigate their damages, are operating their independent stores at the same lease locations. The leases continue.

THE COURT: I know everyone feels a little pressure with time and the snow is challenging all of us, but for the sake of the court reporter, Mr. Dady, just a little bit slower, okay? Thank you.

MR. DADY: Not the first time I have been told that by a court reporter. In fact, one of them said I have the record for the most pages in two hours, and when she was very young she was kind of proud of that. She's not so proud of it now as she's gotten more experience. I'll slow down. Thanks for the reminder.

So June 1 of '15 the bricks and mortar location in Mooresville opens. There was one corporate visit to that store July 27 of '17. The son, Corey DeNicola, did a visit. One visit, one visit only, to Winston-Salem. Never did visit the Mooresville location.

This is an important slide here, Judge. Pre-termination by Mainstream.

This new POS system was under a lot of discussion, getting a lot of pushback from franchisees. Anitra is one of the most highly-regarded franchisees right now and was consulted in a telephone call by the son Corey DeNicola just before Labor Day. Corey DeNicola calls Anitra and says, What do you think I should do with respect to our proposed Springboard POS system? And Anitra replied, Mainstream should either terminate that contract, let people use the good systems that they have that are working like ours; or, if they are going to leave it in place, they should allow any franchisee who desires to sign up for this new POS system to go ahead and do it, but they shouldn't make it mandatory under threat of termination.

Corey responded, I'll think about it over Labor Day. He did. A few days after Labor Day he called and said to Anitra, We're going to move forward as planned mandating the new system and termination if you don't.

Indeed, a few days later, September 19 of 2019, Mainstream directed the Mitchell defendants to migrate to the new POS system and said, If you don't, we're going to default and terminate you.

And indeed, September 27 of '19, concerned about that, the Mitchells responded with a very lengthy e-mail. It's Exhibit D to the complaint setting forth the reasons why they had a good system. This new system hasn't been

properly tested. There's been no demonstration that there will be any positive return on investment from the big investment that's required, and so you really shouldn't be mandating it under threat of termination. That's Exhibit D to their complaint.

October 2, Mainstream issued two formal notices not just of default but also of termination. If you don't purchase and have this new system up and running within 30 days, you are -- we're hereby notifying you that you will be terminated as a franchisee effective November 1 of 2019. That's what occurred. That's the termination by Mainstream. There was no abandonment. They terminated our client effective November 1.

We contend they didn't have the lawful right to do that. So we immediately -- our clients wrote back and disputed that right to terminate saying it's not commercially reasonable for the reasons we've explained. You aren't giving us other alternatives. And if you don't -- we're calling on you now to invoke our rights under Section 16.2. It's one of the only franchisee-friendly paragraphs in the Franchise Agreement. There's a couple of them, but that one says if we're not doing the job as your franchisor, you can give us 30 days' notice; and if we don't start to cure that deficiency, you have the right to end the relationship in 30 days. So that notice was sent and it's

Exhibit F to the complaint.

The requested cure did not happen. It wasn't started. In fact, they said, No, we're going to go forward and terminate, as we said, on November 1.

On to November 1. That's the date that they had been advised by the franchisor they were terminated, and we contend that termination was wrongful but we said in a letter back to them, Because we have the right to terminate this relationship if you materially breach and don't seek to cure, and that is the situation, we are now exercising our right, and we are now exercising our lawful right to also end this relationship on November 1.

And in that letter, by the way, they did also say, If you want to buy back any of our assets, tell us what you want to buy and we'll give you a week to do that and we'll give you a fair market price. No response was received.

November 1 then, given the fact that the franchisor had said that you're terminated as of that date, and they said you don't have the right to do it but we're also terminating as of that date, they completely shut down their two businesses and ceased operating as Mainstream at both locations and proceeded to go dark for about ten days while they worked on re-doing their two spaces to start independent businesses.

In that ten-day period Mainstream didn't sit idly.

They called our clients' two landlords and said, You know, these folks no longer have the legal right to operate a clothing store in your space. That, of course, caused some serious stress and for our clients' efforts to try and mitigate their damages by starting a new business which was now underway in this ten-day period.

And during that ten-day period Marie DeNicola, Corey's mother, approached Constant Contact, which our clients were paying to store 9,777 customers e-mails, and she convinced Constant Contact they should transfer those e-mails that were stored at the expense of my clients to her; and she sent out 9,777 notices saying these folks are out of business but you should use this coupon I'm giving you and go see the competing Mainstream down the road 10 or 15 miles; and indeed that Mainstream franchisee business had a significant uptick because of her capturing our clients' customers.

What the *Pirtek* case says, when it's your hard work that generates the customers, it doesn't matter what the franchisor says in the contract. It doesn't matter what the writing says. Those customers are the customers of the folks who worked to earn them and keep them and nurture them, but they were taken from her by Marie DeNicola and transferred to another franchisee.

In a clever effort to recreate the history,

Mainstream's counsel on November 5th wrote a letter claiming that his clients had terminated effective November 1, and that we had unlawfully -- and we had lawfully terminated November 1 -- that you abandoned the franchisees. No, that's not abandonment of franchise. When you have an ongoing relationship with ongoing obligations and you leave, that's abandonment.

And the reason they want to claim abandonment is because they blew the statutory notice requirements. They were supposed to give our clients 90 days' notice of the termination, not 30; 60 days to cure, with termination only to follow at the end of that 90-day period. There's an exception if you abandon your franchise, and that's why they are trying to claim after-the-fact of termination on November 1 there was a November 5 abandonment, and that's legal poppycock.

November 4, November 7, the landlords are calling asking for indemnification because the franchisor is making noises like we don't have the lawful right to keep you in our spaces. That's interfering with clients' contractual opportunities which they needed to pursue to mitigate the damages caused by this wrongful termination.

November 11, after being dark for ten days, Brad and Anitra Mitchell open the independent store in the Winston-Salem lease location, and Anitra's mother opens an

independent store at the Mooresville location.

November 15, given all these noises against our clients' landlords and against them, we commenced an arbitration action seeking a declaration that what they did was unlawful and seeking monetary damages. A few days later then they commenced this action for injunctive relief.

THE COURT: Talk to me for a second about the nature of the women's clothing boutique that they have open now. Mainstream argues that it's the very same types of clothes and accessories. Your client says that's not true. I think Mainstream believes you concede that point. If you would address that, please.

MR. DADY: We don't concede that we're selling the same lines of clothing. And there was one mistake, as you correctly noted, where an employee put one Mac and Me point out. They claim a proprietary interest in Mac and Me and in one other line that's got two initials as being proprietary to Mainstream. Our clients are selling neither one of those.

They are selling women's clothing, though, which some folks' definition of competitive, it might be -- you know, it's a women's clothing business and there's lot of them out there competing with each other. Our clothing is actually significantly lower priced in the two independent locations, I'm advised, but they aren't purchasing or

reselling any proprietary products of Mainstream, and they aren't using the Mainstream marks and there's no proprietary information that's --

THE COURT: And it's at a lower price point than the Mainstream product?

MR. DADY: It is. And the revenues are lower, too. They are operating as an independent after, through their efforts, not Mainstream's. The Mainstream name had a good reputation in the two markets where they were operating and they had to end that because of the termination. But they have done it and they've got new lowered price lines of clothing, but they are in a similar business selling women's clothing.

So the -- on to the preliminary injunction and some of those factors, I want to speak to some of those.

And we appreciate the training that Rachel Zaiger got on the PowerPoint. Here's the second one we handed to you, Judge. The opposition to preliminary injunction, and we like to think and speak macro to micro whenever we can. And the first point on the second slide would be the macro point. Mainstream's motion should be denied because it cannot meet its burden of establishing the four factors. Interesting that Mr. Miller would talk about three. There are four actually necessary to obtain injunctive relief.

And on to the next slide. I think we've got the

procedural law in Minnesota. We've got the substantive law in North Carolina, and seeking injunction is actually kind of a combination of two, I would say.

But Judge Tunheim does a good job of laying out the *Dataphase* factors, and there are four of them, and the phrase Judge Tunheim uses is a good one. That is the party seeking injunctive relief, in Judge Tunheim's words, bears the burden of establishing the four *Dataphase* factors.

Number one, probability that Mainstream will succeed on the merits. Judge, in the interest of time I would like to save my points as to that for the second motion because as you noted correctly in your note back to us that the motions are interrelated.

But I want to go to number two. As the judge correctly points out, to demonstrate irreparable harm, the moving party has got to demonstrate that what they are seeking is not compensable with money damages. That's a quote from the judge in this particular case, the *Great America Leasing* case.

In this case Mainstream has made eight counts in their complaint against our clients. One of them is for the injunctive relief that they claim they should be entitled to because they just can't get money damages. In the other seven counts, what they are seeking by way of relief is money damages. This is not a case where there's

demonstrable irreparable harm. This is a case where they are seeking money damages. This case, as they say in their complaint, in seven of the eight counts is about money damages and for that reason alone it should not be granted.

But more significantly, topic three hits close to home for my family and me and my law practice. It says what you need to do if you're seeking injunctive relief is take a look at -- the decision maker -- compare the hardship to the Mitchell defendants. If the injunction is granted, they would be out of business. Their opportunity to mitigate would be lost. All they know for many, many years, both of them -- they are a team, husband and wife team. Husband financial and computer issues, Anitra is a very capable salesperson. They would be out of business. They would be unable to mitigate. They would have tremendous hardship.

On the other hand, the hardship to Mainstream if the inunction is not granted, business would go on as usual. They have figured out how to capture our clients' customers. They are marketing to them on the behalf of the other stores where their sales are going on.

This reminds me of the first case I had for my father, 1975, where Judge Lord had to decide if he goes one way, my dad and other beer distributors like him are out of business. If he goes the other way, they stay in business. What Judge Lord said, affirmed by the Eighth Circuit, is the

imbalance is so disparate here that the damage to Mr. Dady and his colleagues in this Hamm's beer business, that you can't weigh them on the same scale. He went right to that factor and said injunctions, um, that these folks are going to be allowed to stay in business, and his decision was affirmed by the Eighth Circuit Court of Appeals.

We do the same balancing here and for the same reason. This injunction should be denied so that our clients, the Mitchells, can stay in business.

And on to topic four, the public interest. Covenants not to compete are disfavored in North Carolina and elsewhere. It's also the case that we've got a Minnesota Franchise Act that says what we need to do for folks that buy franchises from Minnesota franchisors. We need to level the playing field for them because the writings are always so one-sided to favor the franchisor, we're adding the protection of the Minnesota Franchise Act to level the playing field. That's public policy in Minnesota and it's also public policy in North Carolina.

Furthermore, the public interest in North Carolina is spoken with respect to the *Window Gang Ventures* case. It's a 2019 case and it cites a Superior Court of North Carolina case in 2013. It says the public policy in North Carolina is you do not enforce overly-broad noncompete language. And what they say is to the extent you are saying

that the noncompete includes similar businesses, both of those cases, the *Window Gang* case and the case that was cited -- that cleaning company case, say the fact that you say that you can't even compete if you're a similar business all by itself renders that particular noncompete covenant overly broad and it's unenforceable as a matter of law. No fact issue there.

And in this case the noncompete case is even broader. Not only does it say the noncompete keeps you out of any similar business, it also says that it keeps you out of any business that is in any way competitive. So if you're selling lady's clothing, I could see where in some way that would be competitive. This is overly broad and for that reason should not be enforced.

On to slide 23. Just to back up what I was talking about earlier with reference to Judge Lord, we've also given you a more recent case. It says under balance of harms, a franchisee can show irreparable harm by plausibly showing that they will go out of business pending a trial. And that's, of course, what would occur here.

And the thrust of Mainstream's argument is, as I said, seven out of eight counts, yes, we want money damages for those violations. That's not the type of irreparable harm that this Court should be granting injunctive relief.

And on to slide 24. Just a summation of some of

the factors that we referenced before, including the fact that to the extent an injunction would cause people to have ongoing lease obligations is another form of irreparable harm. Mainstream can be compensated by money damages and they have already figured out we don't think it's ethical or appropriate to be taking our clients' customer lists and selling to those folks and thereby depriving us of our efforts to mitigate damages, but they are doing it. They have figured out how to take advantage of what they did to our clients rather than be suffering.

And finally with respect to the public interest at slide 25, it is in the public interest to allow folks who have been damaged by the type of conduct that amounted to a prior material breach by this franchisor to be able to mitigate their damages by operating a similar business, but it's not the same, using the same name, the same proprietary products, they are selling lower cost women's clothing and they are operating in the lease that's got some term to run to it; and that's appropriate and consistent with the public interest, not inconsistent.

So with that, unless the Court has questions, that concludes my comments.

THE COURT: Thank you very much, Mr. Dady.

All right. Brief response if you have one. I think if we hear you out completely on this, I think the

motion to dismiss should go more quickly.

Mr. Miller.

MR. MILLER: Just a couple of points, Your Honor. On the argument that this is not the same type of business, I mean, it clearly is. They admit that this is an upscale women's boutique business -- he just put it up on his slide -- that sells women's clothing and accessories. That's the exact same thing that Mainstream is. It's an upscale women's boutique that sells --

THE COURT: It's such a general description it's hard for me -- it's just, you know, men's clothing, children's children, you can have very different stores that fall under those categories.

MR. MILLER: Your Honor, but it's a boutique, right? You know, it's not some large department store. It's a boutique that focuses on selling clothing to women on an upscale basis. And I'm having a hard time understanding how somebody could look at that and not see that those --

THE COURT: For instance, you could describe Talbots and Evereve as both being upscale women's boutique stores and they have completely different audiences. So it depends. I don't really have a handle on exactly what they are selling. I just hear these general --

MR. MILLER: Well, again, they announce themselves as an upscale women's boutique business selling women's

clothing and accessories. That's the exact same thing that Mainstream is.

THE COURT: But you heard what I just said. I can name two stores that --

MR. MILLER: I understand, Your Honor. But listen, we can part and parcel all day long, but the fact of the matter is that it's a competing business. And so that obviously is a concern and we fit -- we feel like it fits within the definition or the language of the noncompete.

On the monetary damages, we've again, we've established or highlighted case law that demonstrates that in the instances where we're suffering irreparable harm, the courts have said as a matter of law you cannot be compensated for those losses through monetary damages. And I'm not sure what Mr. Dady is pointing to in the complaint, but we've made it specifically clear in the instances where we're seeking an injunctive relief that that can't be adequately compensated through monetary damages.

The two instances where we're seeking monetary damages are the marketing fees and lost future fees; and yes, in those instances we would be, and expected to be, compensated through monetary damages.

With respect to the training aspect, Your Honor, we've set forth in our declaration from Mr. DeNicola the specific training that the franchise received. They may

object to it and say that it wasn't good enough, but the fact of the matter is is that they were trained on our business methods and our business systems, and they received our confidential and proprietary manuals. There's no dispute that that occurred. They may try to argue and say, Well, it wasn't good enough. That's fine. But the fact of the matter is that they received training on how Mainstream franchisees operate their business, and they cannot use that inside knowledge to now compete directly against Mainstream's franchisees.

And again, lastly, Your Honor, again, to the extent that the Court is not comfortable with the similar to language, we've highlighted several cases in our brief that demonstrate that it's an easy fix. The Court can simply blue pencil that and effect the noncompete written without that language.

Thank you.

THE COURT: Thank you very much.

Okay. Let's move ahead to the motion to dismiss.

MR. DADY: And I might just say on that blue pencil issue, North Carolina law says if it's too broad, you don't blue pencil; and even those older cases where there was some blue penciling, it's limited to one thing, crossing out some language. And here you couldn't cross out enough language to narrow that competitive business or that similar

business language enough to make it not unreasonably broad.

With respect to the Motion to Dismiss, Your Honor, we've given you several slides there, but I'm just going to limit my comments to the second slide, and I've got six documents that I want to reference that are in the record in those subsequent pages, but the focus is going to be with respect to that second slide.

North Carolina law is clear that to the extent there's a prior material breach of the Franchise Agreement as augmented by the covenant of good faith and fair dealing, while recognized under North Carolina law, that eliminates any post-term obligation for any noncompete even if it weren't unreasonably broad.

And with respect to the documents that I want to direct the Court's attention to in the record, because there are plenty of them, the first one is Exhibit D to the complaint. And that was the September 27, 2019 e-mail that Anitra and Brad Mitchell spent a lot of time putting together together, because Brad is the computer person, Anitra is the salesperson, to lay out in substantial detail why it is, as Corey had asked, that the current POS system is working as well, if not likely better, than the other one with no additional expense to them or others who were operating. And she went to great length to lay this out and received unfortunately no response other than put in the

Springboard system or we're going to terminate you effective November 1, which is what they did.

On to Exhibit F. They sent them the termination effective November 1, and we recognize in that October 3 letter, which is Exhibit F, we acknowledge receipt that you told us our Franchise Agreements are terminated on November 1 of 2019, and we're telling you that you didn't have the legal right to do that, but we do have the legal right to terminate you on November 1 because 30 days ago we asked you to withdraw this wrongful termination notice and you haven't done it, so now we have the right under Section 16.2 of the Franchise Agreement to end this relationship and we're now doing it.

So it's effected on November 1. There is no abandonment on November 5. They terminated us on November 1 unlawfully. We terminated them lawfully on November 1, and the abandonment is revisionist history that did not occur.

On to Exhibit H. On November 1 then our clients write to Mr. DeNicola to confirm the termination, disputing his right to terminate on that date, but saying we have the right to terminate as of that same November 1 date and we're doing it. And if you want to purchase any of our assets, tell us what you want to buy and we'll give you a fair market price, but please do it in a week. No response.

Exhibit A was the Franchise Agreements. And

there's three particularly significant paragraphs for this particular proceeding. One of them is paragraph 15.2 under Notice of Breach. And that 15.2 says: Except as provided for in Article 15.4 and 15.5, that relates to abandonment. That's why Mr. Miller keeps trying to say there's an abandonment here, but the fact is our clients remained active until the relationship was ended by them unlawfully, and by our clients lawfully. There's no abandonment, so the rest of the paragraph is what applies.

Mainstream will not have the right to terminate this agreement unless and until written notice setting forth the alleged breach has been given to franchisee by Mainstream, and franchisee fails to correct the alleged breach, how long do they have? The rest of the sentence. Within the period of time specified by applicable law.

Well, the applicable law, as the addendum points out, is the Minnesota Franchise Act. They were supposed to have been given 90 days' notice, 60 days cure, with termination to be effective on the 90th day only if any reasonable cure was effected. Instead they were given only 30 days' notice.

On to paragraph 16.2. That gives franchisee the right to terminate the agreement, provided it gives written notice setting forth the alleged breach to Mainstream, and Mainstream fails to commence the actions necessary to

correct the alleged breach within 30 days after having been given such written notice. That notice had been given 50 days earlier listing several failures in the relationship but also saying it's wrongful to be saying you're going to terminate us in 30 days. Please withdraw it. They didn't. We therefore had that right to terminate at the end of that 30-day period, which they did.

And then finally, on to 20.7, apropos Mr. Miller's surprising claim that the Minnesota Franchise Act and the addendum in the FDD doesn't apply, the writing that his law firm put together for Mainstream says the opposite. Paragraph 20.7. In both Franchise Agreements under the integration clause, entire agreement, paragraph 20.7. The last sentence. "Nothing in this agreement is intended to disclaim the representations Mainstream made in the franchise disclosure document Mainstream provided to franchisee."

That franchise disclosure document, both of them, contained in that franchisor disclosure document the Minnesota addendum that says if you want to terminate, unless they have abandoned, you got to give them 90 days' notice, 60 days to cure. You better have cause, and then you can terminate at the end of the 90 days. And that's in the Mainstream Franchise Agreement at the Minnesota addendum, which is actually quoting the language from the

Minnesota Franchise Act.

It says if you're selling to -- from the State of Minnesota, this is what you got to put in the Franchise Agreement. Gray Plant drafted the documents. Their code is down in the bottom. Gray Plant. My clients were not represented by counsel. There was no knowing waiver of anything. In the writing that the Gray Plant law firm put together they said we're not disclaiming anything in our Franchise Agreement that's set forth in the FDD. In the FDD is the Minnesota addendum that expressly references the applicability of the Minnesota Franchise Act, and the same provisions set forth in that addendum are in the Minnesota Franchise Act at 80C.14 subdivision (3).

So they committed prior material breaches, including they didn't follow the notice provisions. They didn't have commercially reasonable good cause to terminate for failure to install a POS system that wasn't needed; and secondly, they violated the applicable Minnesota Franchise Act when they didn't give the 90 days' notice and the 60 days to cure.

And thirdly, these claims should be dismissed in their entirety because, as the North Carolina court has held as a matter of law, these post-termination competes when they say you can't compete in any business that is in any way competitive with, or similar to, Mainstream's business,

is on its face and under North Carolina cases -- we cited two of them -- overly broad and you don't blue pencil them in any way. You found them overly broad and as a matter of law these claims should all be dismissed with prejudice.

THE COURT: Thank you very much, Mr. Dady.

Mr. Miller.

MR. MILLER: Your Honor, the defendants seek dismissal by primarily disputing the facts in the complaint and trying to introduce new facts in support of their arguments instead of contending that Mainstream has sufficiently -- or has failed to sufficiently set forth facts that establish a plausible claim.

Indeed, if you look at their brief they specifically state, quote, Mainstream's claims are based on an erroneous misunderstanding of the facts and misinterpretation of the contract.

So in their own brief they admit that there are factual disputes here, Your Honor, that can't be decided on a motion to dismiss and for that basis alone the Court should dismiss or not grant their motion to dismiss.

Here we only have to demonstrate that we've pled the facts sufficient to establish a plausible claim, which we've done. We've demonstrated that under North Carolina law there's two elements to a breach of contract claim. One, that there's a valid contract exists; and two, that

they breached that contract.

We've set forth facts that support each of our six or seven counts that demonstrate that there was that valid contract and that a breach occurred in that situation. So based upon that, Your Honor, you know, it's pretty clear that there is no basis for granting their motion to dismiss.

They basically -- throughout Mr. Dady's arguments and in their briefs they basically contest a couple of different things. One, that we engaged in some prior material breaches that somehow release them of their post-termination obligations. For the reasons already set forth, that's just not true.

But from a motion to dismiss perspective, there's a dispute over whether or not we breached our obligations, right? And so from that standpoint, this Court can't decide those facts as part of a motion to dismiss; and its claims, any claims that they are relying upon to say that the claims are barred as a matter of law because of our prior material breaches, that's not going to be enough to carry the day on a motion to dismiss. And so again, for that reason it needs to be -- their motion needs to be denied.

Similarly, with respect to their implied covenant claim, they are trying to argue or suggest that as a matter of law we have breached the implied covenant of good faith and fair dealing, and so as a result of that, none of our

claims can move forward. But again, that requires a factual analysis. There's a fact there that can't be decided on a motion to dismiss.

Similarly, with respect to the MFA claim, again, we've argued this before. I've set forth why it is that the MFA doesn't apply. But even if it did apply, Your Honor, the Court has to go through a factual analysis of does it actually apply and, if so, was there an actual violation of the MFA.

In this situation in a motion to dismiss, the Court can't make that decision. It requires a factual analysis and a factual determination which isn't appropriate for a motion to dismiss.

With respect to the noncompete claim, again, we've set forth facts to demonstrate that there's a valid noncompete in place; that they have breached the terms of that noncompete; and as a result, we're entitled to injunctive relief. And so we've sufficiently pled the facts supporting that claim. That's enough. That's all we have to do. We don't have to go any further.

And again, we've demonstrated already with respect to the motion for preliminary injunction why the noncompete is enforceable, that it's not overly broad, and that it should be enforced.

Similarly, with respect to the post-termination

obligations, we've set forth, again, that there are post-termination obligations in the Franchise Agreement specifically that they must comply with. We've demonstrated facts to show that they have not complied with that. And so we've appropriately pled facts sufficient to support a plausible claim there.

They attack those by not stating, again, that we have not pled the sufficient facts. They simply dispute the facts. Again, not appropriate for a motion to dismiss.

With respect to the monetary claims in Counts IV and V, they argue that not only should they be dismissed because of our prior material breaches, but they should be dismissed because they are subject to arbitration.

Your Honor, the monetary claims, which are IV and V, seek marketing fees and lost future fees. In this instance they are directly tied back to the carve out provision in the Franchise Agreement which says specifically that you can seek relief, injunctive relief, in this court for any post-term obligations, right? And one of those post-term obligations in Article 17 is payment of all fees there due and owing. In this instance there are past due marketing fees and there are lost future fees. And so as a result, those fees -- those claims are appropriate in this court because it satisfies the carve out provision.

In addition, it's exempt from arbitration because

these fees that we're seeking are directly related to the immediate termination of the Franchise Agreement as a result of the defendants' abandonment of their franchise stores. Under the express provisions of the Franchise Agreement, again, if there is a claim related to the immediate termination, then those claims are not subject to arbitration and can move forward appropriately in this court.

And to the extent that they claim that our claim for lost future fees is speculative, again, Your Honor, that's a fact dispute that can't be decided on a motion to dismiss, and so their motion with respect to that claim needs to be denied.

And then lastly, on the civil conspiracy claim, again, we've alleged plausible facts demonstrating that the defendants conspire to invade -- to evade their noncompete provisions and avert customers that have caused injury to Mainstream, and so we have satisfied the pleading requirements for a civil conspiracy claim.

And with respect to the claims against all defendants, Your Honor, it's pretty clear from the case law that we've cited that if defendants are -- even if they are non-signatories to the Franchise Agreement, if they are all acting in concert with one another, and they have conspired or schemed together to avoid a contractual obligation, then

all of those participating parties can be held responsible for that.

I want to focus, too, just again, Your Honor, on this termination issue. We never terminated effective November 1st. We couldn't have terminated effective November 1st. We sent the notice of default letter on October 2nd. We gave them 30 days to cure. Under the express terms of the Franchise Agreement, both 15.3 and 15.4, a termination by us doesn't become effective until we provide them with written notice of that termination. We never provided them with written notice until November 5th. So that's when the termination became effective.

They, on their own, decided before that time that they wanted to voluntarily abandon their franchise and cease operations. That's on them. They chose to do that. And so because they ceased operations prematurely, we went ahead and terminated based upon abandonment. And I think the facts establish that.

Finally, Your Honor, the addenda that is in the franchise disclosure document that defense counsel talks about isn't a representation in the FDD. It's simply a form agreement. It was not incorporated into the Franchise Agreement in no way, shape or form.

Similarly, Your Honor, with respect to the audit and accounting claim, that -- in that instance, that claim

is not -- that claim can move forward. It's not -- it doesn't apply only in a situation where the Franchise Agreement is in place. If you look at Article 17.1C of the Franchise Agreement, it specifically says that if an agreement expires or is terminated for any reason, franchisee will comply with all other applicable provisions of this agreement. That would include the audit provision which we are seeking an accounting under pursuant to Article 6. And so, again, this -- the claim, the audit and accounting claim can proceed and is not subject to a motion to dismiss.

Your Honor, unless the Court has any questions, that concludes my arguments on the motion to dismiss.

THE COURT: Thank you.

Briefly, Mr. Dady.

MR. DADY: Very briefly, Judge, unless you have any questions.

We did get notice on -- dated October 2, not just of default but of termination. It wasn't just a notice of default. It says you are going to be terminated. It will be effective November 1 unless you have by that time purchased and installed the POS system. And as we acknowledged on our October 3 response, that termination by them was wrongful, but we're now exercising our 30-day right to exercise our contractual right to terminate.

And the fact that they breached the agreement and then try to enforce post-term noncompetes is crystal clear under North Carolina law, prior breach excuses any obligation to perform. Otherwise, you could do nothing, as they essentially were doing for our clients, and then try to keep folks out of business for another two years, even though they didn't deliver on their commitments under the agreement. And that's just not the public policy or appropriate law, and it's not the law in North Carolina or Minnesota which does say the Minnesota Franchise Act applies if the sale takes place from Minnesota even to out-of-state franchisees.

THE COURT: Thank you.

All right. The Court will take these motions under advisement and they do require more study on my part. But as I sit here today, I'm inclined to deny both motions. With respect to the motion to dismiss, because of the procedural posture of the motion the Court must accept the facts as pled as true, and so I'm of the view that fact issues preclude dismissal at this stage of the game.

With respect to the motion for a preliminary injunction, the Court has a lot of concerns about, as you point out very clearly, Mr. Miller, you live in different factual worlds here. And so whether the Court, based on all these factual disputes, can determine who is going to

prevail here or who has the greatest likelihood of prevailing, I don't know that the Court can do that at this point.

I also am concerned that comparing the harms doesn't necessarily favor your client. I'm not even convinced necessarily that there's irreparable harm. But as I said, this is just my instinct now. I am going to study this further.

But in the meantime it does seem to me, based on my ten years as a Magistrate Judge, that there is a path to resolution here. What I think both sides are looking at is years of costly litigation, and I'm sure nobody wants that. I think both sides want a divorce, and I think there are ways to make the divorce palatable to both sides so that Mainstream's interests are well preserved and the defendants' interests are well preserved. I really think there's a pathway here.

The women's clothing and accessory business is very broad and there's lots of ways in which you can be an upscale women's clothing boutique and accessories and actually not even compete at all. I think that has to do with the market. Are you targeting older women? Are you targeting teenagers? What kind -- are you looking more at beachwear? Are you looking at formal wear? I mean, it's an enormously broad umbrella of clothing. And I think there's

a way to navigate this and negotiate a resolution that is fair on both sides. And I think that just seems so much more sensible to me than years of litigation on this issue for both sides, to be honest.

I notice that this was originally assigned I believe to Judge Bowbeer but then it went to Judge Leung. Am I correct about that?

MR. MILLER: That's correct, Your Honor.

THE COURT: Okay. I spoke with Judge Leung about this and asked if he would be willing promptly to meet with the parties, and at least spend a full day and evening trying to negotiate some resolution to this, and he's agreeable to it. He's agreeable to doing it very soon. I asked him if he could do it in the next 30 days, and he was agreeable to that. So he's expecting a call from the parties. He may have left now because of the snow, but certainly in the next week if you can call him no later than, I'd say, next Wednesday or Thursday and schedule a time.

In the meantime, these motions will remain under advisement. I will continue to do my study. I may change my mind. I don't know. I'm just telling you what my initial thoughts are if that's helpful at all in trying to reach a sensible resolution of this case.

Any thoughts or questions about my remarks?

MR. DADY: Thank you, Judge. You kind of remind me of earlier days in your tenure as a judge here, and we would -- and we have resolved lots of cases over the years with the Gray Plant firm and we'll give it another try here.

THE COURT: And I think Mainstream's interests can be well enforced here with a reasonable resolution.

Court is adjourned.

(Court adjourned at 2:49 p.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Carla R. Bebault
Carla Bebault, RMR, CRR, FCRR